NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

| | |
|---|---|
| DARNELL DOYLE,<br><br>Petitioner,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Respondent. | Civil Action No. 13-5284 (RMB)<br><br>**MEMORANDUM OPINION** |

This matter comes before the Court upon Darnell Doyle's ("Petitioner")motion seeking to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. For the reasons set forth below, this motion will be denied as untimely, and no certificate of appealability will issue. Petitioner, however, will be allowed an opportunity to elaborate on his position that his motion is timely.

On November 23, 2007, Petitioner was arrested for his participation in the sale of a controlled substance. See generally United States v. Doyle, Crim. Action No. 08-0281 (RMB) (D.N.J.). In a search incident to his arrest, law enforcement found a loaded and operable firearm. Petitioner was charged with a violation of 18 U.S.C. § 922(g)(1) and, on November 14, 2008, pled guilty. On May 15, 2010, this Court sentenced Petitioner to 100 months im prison, a sentence at the lower range of the applicable Guideline.

On January 18, 2011, Petitioner commenced a § 2255 action, see Doyle v. USA, Civil Action No. 11-0255 (RMB) (D.N.J.), but withdrew that application on October 21, 2011, prior to resolution on the merits. See id., Docket Entry No. 33.

Almost two years later, on September 4, 2013, Petitioner filed the within § 2255 petition.[1] Petitioner advances two arguments.[2] Specifically, he asserts: (a) that his sentence was improper because this Court unduly considered Petitioner's involvement in the controlled substance transaction preceding his arrest; and (b) that he was stripped from his right to appeal the involuntariness of his plea because of prosecutorial misconduct and ineffective assistance of his counsel.[3] Petitioner avers

---

[1] Contrary to the Respondent's argument advanced in the criminal matter, because Petitioner's initial petition in Doyle v. USA, Civil Action No. 11-0255, was withdrawn prior to resolution on the merits, Petitioner's instant proceeding would not qualify as "second or successive" of Doyle v. USA, Civil Action No. 11-0255.

[2] Petitioner's third challenge paraphrases his first two claims. See Docket Entry No. 1, at 6.

[3] Petitioner's failure to specify the alleged misconduct and the alleged acts of ineffective assistance renders his challenges to his plea deficient under Habeas Rule 2(c), which obligates a petitioner to, inter alia, "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." 28 U.S.C. § 2254 Rule 2(c), (applicable to Section 2255 proceedings through Rule 1(b)). However, since this oversight could be cured, at least theoretically, by Petitioner's repleading, the Court does not factor this error into its analysis.

that his petition is timely in light of Alleyne v. United States, 133 S.Ct. 2151 (June 17, 2013).[4]

A § 2255 motion must usually be filed within one year of the challenged conviction becoming final. See 28 U.S.C. § 2255(f)(1). When a defendant does not appeal a sentence, judgment becomes final ten business days after the entry of the sentence. See Fed. R. App. P. 4(b) (time to file notice of appeal from criminal judgment is 14 days).[5] Here, Petitioner's sentence became final in May 2010, more than three years prior to commencement of the instant matter. Hence, this motion facially

---

[4] It appears that Petitioner "appends" his claim based on the alleged involuntariness of his plea to his attack on his sentence in order to assert that both challenges are timely in light of Alleyne. See, generally, Instant Matter, Docket Entries Nos. 1 and 1-1.

[5] A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;
(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

is untimely with regard to, at the very least, one of Petitioner's attack on his plea. This is so because the unspecified deficiencies in the defense counsel's assistance and the unspecified errors in the prosecutor's conduct had to cease, at the latest, on the date of Petitioner's sentencing. Consequently, even if this Court were to hypothesize that Petitioner's unspecified challenge had merit, this challenge is facially untimely.

Similarly, Petitioner's attack on his sentence is untimely as well because his reliance on Alleyne is misplaced. In Alleyne, the petitioner was charged with the offence of using or carrying a firearm in relation to a crime of violence, which carried a 5-year mandatory minimum sentence that increased to a 7-year minimum "if the firearm is brandished" and to a 10-year minimum "if the firearm is discharged." Alleyne, 133 S. Ct. at 2155-56.[6] In rendering its conviction, the Alleyne jury indicated in its form that the defendant had "used or carried a firearm during and in relation to a crime of violence," but not that the firearm was "brandished." Id. at 2156 (brackets omitted). When the presentence report recommended a 7-year sentence, the Alleyne petitioner objected, arguing that the verdict form clearly indicated that the jury did not find

[6] In other words, the fact of "brandishing" (or "discharging") is an *element* of the offence which corresponds to a mandatory minimum term at 7 years (or 10 years).

brandishing beyond a reasonable doubt and that raising his mandatory minimum sentence based on a sentencing judge's finding of brandishing would violate his Sixth Amendment right to a jury trial. The sentencing court overruled that objection by relying on Harris v. United States, 536 U. S. 545 (2002). The appellate court affirmed, but the Supreme Court reversed, basing its decision on Apprendi v. New Jersey, 530 U. S. 466 (2000).[7] See Alleyne, 133 S. Ct. at 2163. However, "where no mandatory *minimum* penalty [is] at issue, Alleyne is [simply] inapplicable." United States v. Sechler, 2013 U.S. App. LEXIS 16700, at *4, n.1 (3d Cir. Aug. 13, 2013) (emphasis supplied).

In the case at bar, Petitioner's timeliness argument (asserted to support his challenge to his sentence) turns on the applicability of Alleyne. Petitioner's reliance on Alleyne, however, is misplaced because the issue of Petitioner's sentencing neither implicated a consideration of the mandatory minimum nor required this Court to make a factual finding as to

[7] The supreme Court in Apprendi concluded that any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime.

an element of the offence raising such mandatory minimum.[8] See Sechler, 2013 U.S. App. LEXIS 16700, at *4, n.1.

Hence, because both of Petitioner's challenges are untimely, Petitioner's § 2255 motion will be denied. Local Appellate Rule 22.2 of the United States Court of Appeals for the Third Circuit states that, when a final order denying a motion under §2255 is entered, the district court must determine whether a certificate of appealability should issue. Congress has mandated that "[a] certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Where, as here, the court denies relief on procedural grounds, a petitioner is entitled to a certificate of appealability only if he can demonstrate both that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the court is correct in its procedural ruling. See, e.g., Slack v. McDaniel, 529 U.S. 473, 484 (2000); Bivings

[8] Moreover, while Alleyne was a new rule of law, it would not be "retroactive" within the meaning of § 2255(f). Therefore, it would not supply a valid basis for § 2255 habeas relief even had Petitioner's sentencing involved a mandatory minimum prison term analysis. See United States v. Reyes, 2013 U.S. Dist. LEXIS 112386 (E.D.Pa. Aug. 8, 2013)(providing a careful and extensive analysis of Alleyne under the relevant Supreme Court and Third Circuit law and concluding that Alleyne is not a retroactive rule under Section 2255(f)(3)).

v. Wakefield, 316 F. App'x 177, 179 (3d Cir. 2009). This Court is satisfied that jurists of reason would not find it debatable that Petitioner's §2255 motion is time-barred and, thus, jurists of reason would not find it debatable that Petitioner has failed to make a substantial showing of the denial of a constitutional right. Hence, no certificate of appealability will issue.

However, being mindful of the Court of Appeal's teaching that "courts should give notice that a limitations problem may exist, as well as provide an opportunity for a habeas movant or petitioner to respond," United States v. Bendolph, 409 F.3d 155, 165 n. 15 (3d Cir. 2005), the Court will retain jurisdiction over this matter for 180 days so to provide Petitioner with an ample opportunity to file a written statement elaborating on his assertion that his motion at bar is timely, that is, if Petitioner desires to so elaborate and believes, in good faith, that his position is not frivolous in light of the guidance provided to him supra.[9] The Court will direct administrative

[9] Since Petitioner is a pro se litigant, Petitioner's written statement need not be reduced to a formal legal brief, and a clear and concise statement in layperson terms would suffice. The courts agree that an administrative closing has no effect other than to remove a case from the court's active docket and is useful in a case that might remain moribund for awhile. See Papotto v. Hartford Life & Accident Insurance Co., (Sept. 26, 2013). Here, being not in the position to predict whether Petitioner might or might not elect to file a written statement elaborating on the timeliness of his motion, the Court finds resort to administrative termination well warranted.

termination of this matter, but such measure will be solely for the purposes of case management. No Miller notice will issue, because – in the event the motion at bar is untimely – Petitioner's right to file an all-inclusive application cannot be implicated.[10] Respondent will be directed to enter a formal appearance, but such appearance will be for the notice purposes only and no action by Respondent will be directed at the instant juncture.

An appropriate Order accompanies this Memorandum Opinion.

s/Renée Marie Bumb
**RENÉE MARIE BUMB**
UNITED STATES DISTRICT JUDGE

Dated: October 3, 2013

[10] Under United States v. Miller, 197 F.3d 644, 652 (3d Cir. 1999), pro se litigants are notified of their opportunity to withdraw the original motion and file an inclusive § 2255 motion.